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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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APR 30 1997

Federal Communications Commission
Office of Secretary

In the Matter of)
)
Petition for Rulemaking to Amend)
Parts 21 and 74 of the Commission's)
Rules to Enhance the Ability of)
Multipoint Distribution Service and)
Instructional Television Fixed Service)
Licensees to Engage in Fixed)
Two-Way Transmissions)

File No. RM-9060

**OPPOSITION OF WEBCEL COMMUNICATIONS, INC.
TO PETITION FOR RULEMAKING**

WebCel Communications, Inc. ("WebCel"), by its undersigned counsel, submits this opposition to the Petition for Rulemaking ("Petition"), filed March 14, 1997, by firms in the wireless cable industry seeking to allow Multipoint Distribution Service ("MDS") and Instructional Television Fixed Service ("ITFS") licensees to engage in fixed two-way services.¹

¹ *Public Notice*, "Pleading Cycle Established for Comments on Petition for Rulemaking to Amend Parts 21 and 74 of the Commission's Rules to Enhance the Ability of Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions," DA 97-637, RM-9060 (Mar. 31, 1997) ("*Public Notice*"). WebCel is a privately-held corporation formed to develop local broadband wireless services utilizing Local Multipoint Distribution Service ("LMDS"), a stationary wireless technology which employs frequency re-use within a distributed cellular architecture to provide simultaneous delivery of two-way voice, data, and video services to subscribers. WebCel intends to participate in upcoming LMDS spectrum auctions, and to build and operate LMDS systems in markets where it is the winning bidder. As such, WebCel, which will be bidding at auction for the flexibility that the wireless cable industry now seeks to obtain for free, would be significantly and adversely affected by the Commission's grant of the proposal for fundamental restructuring of the service rules for MDS and ITFS.

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INTRODUCTION AND SUMMARY

Wireless cable is a one-way, point-to-multipoint broadcast service that competes with incumbent cable operators and other multichannel video programming distributors (“MVPDs”). Petitioners seek a complete rewrite of the MDS and ITFS rules to establish a new service with virtually unlimited two-way flexibility. The stated reason for this proposed change is to facilitate the ability of wireless cable operators to enter the market for two-way Internet access services and to ensure the continued “competitive viability” of the reconstituted wireless cable industry.² A professed ancillary benefit of the proposal is to provide an alternative means of high-speed Internet access for the nation’s schools.

In fact, the proposal has little to do with either competition or education, but rather is designed to confer a huge financial windfall on ITFS and MDS interests. As demonstrated in the Commission’s spectrum auctions, the unlimited spectrum flexibility that the wireless cable industry now seeks is tremendously valuable. Obviously, if spectrum flexibility were part of the service rules at the time of the recently held MDS auctions (which were concluded less than a year before the Petition was filed), *the winning bids in those auctions would have been substantially higher, and many firms who chose to sit out of the auction of those limited spectrum rights, may well have chosen instead to participate.* Moreover, by failing to auction the flexibility right the industry now seeks, the Commission will deny the market the opportunity to efficiently value such flexibility, preventing its allocation to those most willing and best positioned to use it.

² Petition at 14.

In the words of Chairman Hundt, specifically with regard to a previous MDS related decision, "the FCC is not supposed to be the Federal Christmas Present Commission."³ Yet, this proposed *ex post* giveaway of spectrum flexibility would line the pockets of wireless cable auction winners -- a select group of licensees who are now choosing to forfeit their previous promise of a "wireless cable" business case for a new and reconstituted two-way business model -- at the expense of the nation's taxpayers, who would be denied the fiscal benefits that such flexibility would have brought on the auction block. Grandfathered ITFS and MDS licensees would receive an analogous windfall from the increased revenues such licenses can generate and (in the case of MDS licensees) the substantial asset value premium such licenses would command in the secondary market. The industry proposal would also result in the abandonment of any public interest/educational pretense that remains for the allocation of spectrum for ITFS, turning ITFS into nothing more than a direct public subsidy for its licenses without a quantified government analysis of this subsidy.

Fundamentally altering ITFS and MDS service by granting unlimited two-way flexibility at no cost is also bad spectrum policy. Requiring some new entrants, such as WebCel and winners in other recent spectrum auctions, to bear the license costs associated with receiving spectrum flexibility, while granting the wireless cable industry costless two-way flexibility, undermines market efficiency and network technology deployment by artificially increasing the cost structure for some, but not all new wireless competitors. The capital markets in this country -- already skittish about investing additional resources in wireless auctions in light of the

³ *Report & Order, Matter of Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service, 10 FCC Rcd 9589, 9740 (1995) ("MDS Auction Order")* (Chairman Hundt dissenting in part).

Commission's inconsistent spectrum decisions -- may not devote substantial additional capital toward spectrum auctions where some competitors suddenly are handed substantial new spectrum rights, while others are left to bid for such rights in the market.

In sum, a Commission spectrum "policy" divided against itself cannot stand, and will most assuredly lead to collapse of the auction process. To the extent this Commission remains committed to auctions as the most efficient means of allocating radio spectrum, appeals for carte-blanche and cost-free increases in flexibility after the fact, such as that contained in the instant Petition, must be denied.

DISCUSSION

I. THE WIRELESS CABLE INDUSTRY PROPOSAL WOULD EVISCERATE THE PUBLIC INTEREST RATIONALE FOR ITFS SERVICE, FUNDAMENTALLY ALTER THE NATURE OF THE WIRELESS CABLE BUSINESS CASE, AND PROVIDE LICENSEES WITH A HUGE FINANCIAL WINDFALL

A. Background

ITFS and MDS together include up to thirty three 6 MHz licenses for the provision of educational and entertainment programming respectively, for a total of almost 200 MHz in the "sweet spot" of the spectrum -- the prime 2 GHz band.⁴ Only a sliver of ITFS and MDS spectrum is authorized for return links to subscribers, mostly on a trial basis, and wireless cable is thus fundamentally a one-way, point-to-multipoint broadcast service.

ITFS systems, while required to carry a limited amount of formal educational programming offered to students enrolled at accredited schools, have, over time, been allowed to

⁴ ITFS comprises twenty channels licensed in groups of up to four channels. *Report and Order*, Amendment of Part 74 of the Commission's Rules Governing Use of the Frequencies in the Instructional Television Fixed Service, 9 FCC Rcd 3360 at ¶¶ 1, 20 (1994) ("*Channel Loading Order*"). MDS comprises up to 13 channels. *MDS Auction Order*, 10 FCC Rcd 9589 at ¶ 6.

lease supposed “excess” capacity to MDS operators. MDS operators combine ITFS facilities with their own in order to provide wireless cable service to subscribers. Lease payments from commercial operators to ITFS licensees, are used, presumably, to help defray the cost of the limited educational programming that ITFS operators carry. Over time, this leasing element of ITFS has increasingly supplanted the public interest aspect of ITFS in favor of commercial subsidies, an erosion that would become virtually complete under the industry proposal.

In the *MDS Auction Order*,⁵ the Commission determined to auction authorizations for each of the 487 BTAs and six additional BTA-like areas around the country, which gave winning bidders the right to construct and license facilities to provide *one-way* wireless cable service on any available channels in the BTA. The MDS auctions closed on March 28, 1996 and raised a total of \$216.3 million.⁶ With digital compression and transmission authorized by the Commission in the *Digital Declaratory Order*,⁷ wireless cable operators converting from analog to digital transmission can now provide multiple channels of video programming to subscribers on a single 6 MHz radio channel. Most recently, in the *Internet Public Notice*,⁸ the Mass Media Bureau noted that ITFS and MDS licensees could use their facilities to provide one-way Internet services to subscribers. Clearly, if the Commission had intended wireless cable to be a two-way

⁵ 10 FCC Rcd 9589 at ¶¶ 2, 39.

⁶ *Third Annual Report, Annual Assessment of the Status of Competition in the Market for Video Programming*, CS-96-133 at ¶ 52 (rel. Jan 2, 1997)(“*1996 Cable Report*”). By comparison, the C-Block PCS Auctions, which involved 30 MHz blocks in the 2 GHz band covering the same BTAs, raised \$10.2 *Billion*.

⁷ *Declaratory Ruling and Order, Matter of Request for Declaratory Ruling on the Use of Digital Modulation by Multipoint Distribution Service and Instructional Television Fixed Service Stations*, 10 FCC Rcd 10915 at ¶ 11 (1996)(“*Digital Declaratory Ruling*”).

⁸ *Public Notice, “The Mass Media Bureau Implements Policy for Provision of Internet Service on MDS and Leased ITFS Frequencies,”* DA 96-1720 (Oct. 17, 1996).

service, it could have made that decision at the outset, not after the fact as the industry now urges.

B. The Wireless Cable Industry Proposal Would Fundamentally Change The Nature Of ITFS And MDS Service And Contradict The Basis For Allocating Spectrum to Those Services

Petitioners acknowledge that providing MDS and ITFS licensees with full two-way flexibility would require extensive revisions to the MDS and ITFS service rules and would fundamentally alter the nature of the service provided by these licensees. Indeed, Petitioners' proposed rule changes with explanatory notes continue on for over 62 single-spaced pages. As such, these massive proposed changes are unlike any other the Commission has made over the last several years to bolster wireless cable's sagging business case. Although the Commission adopted changes to improve the competitive position of wireless cable in the *MDS Auction Order*, the Commission made clear that:

[W]hile we are changing the conditions under which MDS service may be provided in the future, such as moving to larger geographic area authorizations and expanded service area protection, *we are not fundamentally changing the nature of the service*. Licensees still will be providing wireless cable service. . . competitive with cable television.⁹

The Commission's other recent decisions on MDS and ITFS likewise do not change the fundamental characteristics of the service. For instance, in the *Digital Declaratory Ruling*, the Commission simply made clear that digital transmissions by ITFS and MDS licensees are already authorized under the Commission's current rules.¹⁰ Moreover, that the wireless cable

⁹ *MDS Auction Order*, 10 FCC Rcd 9589 at ¶ 92 (emphasis supplied).

¹⁰ See *Digital Declaratory Ruling*, 10 FCC Rcd 10915 at ¶ 11 (“[T]he regulatory framework in Parts 21 and 74 . . . can accommodate the use of transmission formats other than NTSC analog, including the use of digital modulation techniques.”).

industry is moving towards digital transmission was hardly a surprise. Thus, for example, in the *MDS Auction Order*, the Commission indicated that it was adopting filing systems and procedures designed to facilitate the transition of wireless operators from analog to digital broadcast transmissions.¹¹ And in the *Second Wireless Reconsideration Order*,¹² adopted and released the same day as the *MDS Auction Order*, the Commission discussed the “imminent transition” from analog to digital transmissions for MDS broadcast stations.

The changes now sought in the Petition make all that the Commission has done thus far to advance the fortunes of wireless cable pale by comparison. Petitioners seek to scrap wireless cable’s one-way architecture, in toto, and replace it with different two-way capabilities. The wireless cable industry not only seeks authorization to use some or all of their 6 MHz channels for return paths from subscribers, but also to cellularize their transmission systems and to aggregate or disaggregate the separate (and in some cases, separately licensed) 6 MHz channels into larger or smaller contiguous blocks of spectrum as needed. Except for interference coordination, there are no practical limits on the flexibility sought by the wireless cable industry.¹³ The changes sought by Petitioners would result in nothing short of the complete

¹¹ *MDS Auction Order*, 10 FCC Rcd 9589 at ¶ 29.

¹² *Second Order on Reconsideration*, Matter of Amendment of Parts 21, 43, 74, 78, and 94 of the Commission’s Rules Governing Use of the Frequencies in the 2.1 and 2.5 Ghz Bands Affecting: Private Operational-Fixed Microwave Service, Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service, & Cable Television Relay Service, 10 FCC Rcd 7074 at ¶ 52 (1995)(“*Second Wireless Reconsideration Order*”).

¹³ The deference with which the Mass Media Bureau is treating wireless cable interests and the critical importance to national spectrum policy implicated by the industry’s proposal suggest that this petition be addressed jointly with the Wireless Telecommunications Bureau. It is ironic, indeed, that the Commission would ask in its Public Notice for comment on “whether and how the Commission can amend its rules to permit *even broader flexibility* than suggested by Petitioners.” See *Public Notice at 2* (emphasis supplied). It is difficult to imagine any more flexibility than the *carte blanche* permission now sought by the industry.

transformation of wireless cable service into a new, two-way telecommunications service, via the conveyance of public rights and assets directly to select private beneficiaries, outside of Congress' intent to collect remuneration for public assets.

C. The Petition Offers No Serious Rationale For Transferring Valuable Rights To ITFS and MDS Interests For Free

WebCel is a strong supporter of spectrum flexibility and believes that licensees are in the best position to determine the best business case for their spectrum. But such flexibility has value and has a price. And like WebCel and others participating in spectrum auctions, firms in the wireless cable industry, to the extent they want such flexibility, should be required to pay for it -- whether through spectrum auctions or through some other mechanism. By awarding flexibility for free, the Commission is impermissibly picking winners and losers in a competitive market, at the public's expense. In WebCel's view, the wireless cable industry would have no need to justify the flexibility they seek today if they were simply willing to pay for it. However, not having made that offer to the Commission, their bid for two-way flexibility is neither justified, nor is it justifiable.

Petitioners attempt to overcome these infirmities in their proposal by offering two justifications for the extraordinary regulatory relief they seek -- increased competition and Internet access to schools. According to the Petition, two-way authority is necessary for wireless operators to remain viable competitors to cable operators, DBS, and other MVPDs, indeed, if it is to "survive" as these competitors purportedly integrate two-way Internet offerings into their services.¹⁴ Thus, according to Petitioners, the proposed rules will advance the public interest by

¹⁴ *Petition* at 11.

bolstering the “competitive viability” of wireless cable, consistent with the Commission’s “long-standing goal” in that respect.¹⁵ Quite to the contrary, if this proposal is accepted, it will cause further auctions and the entry of new competitors, to suffer, thereby reducing net effect the growth of competition.

The industry also has rolled out the “education” trump card, claiming that the proposed rules will further the “goal” of expanding Internet access to the nation’s schools. The proposal supposedly does this by allowing ITFS licensees “whether or not they lease excess capacity for wireless cable operations – to take advantage of the potential that digital technology offers for using ITFS channels to deliver high speed, two-way Internet access.”¹⁶ That Petitioners need this flexibility to remain viable competitors to cable operators has no basis in reality. Today, none of the MVPDs that wireless cable competes with has serious two-way capability. Less than 10% of U.S. TV households are passed by cable systems capable of handling two-way high speed data services, and according to one study, “cost conscious cable operators aren’t moving quickly to upgrade cable systems.”¹⁷ Indeed, some of the nation’s largest cable operators have shifted their focus *away* from the provision of two-way service back to expanded service of traditional cable television.¹⁸ Moreover, throughout the Petition the wireless industry makes reference to the Internet access services being offered or planned by other MVPDs, through technologies such as cable modems. What the Petition ignores, however, is that virtually all

¹⁵ *Id.* at 14.

¹⁶ *Id.* at 18.

¹⁷ *Modem Rollouts Slow*, Television Digest, March 17, 1997.

¹⁸ *Malone says TCI Push Into Phones, Internet Isn’t Working for Now*, Wall Street Journal, January 2, 1997, Section A, at 1; *Time Warner Disconnecting Phone Service?*, USA Today, January 13, 1997, at 1B.

other MVPDs with which wireless cable competes use the same, one-way, addressable architectures as MDS to deliver Internet services. As the Petition acknowledges, wireless cable operators are likewise able to provide Internet access services today, particularly given the added channel capacity provided by digital compression, using cable modems and similar technologies.¹⁹ Far from being required in order for wireless cable operators to respond to competition, the relief they seek is part of a costless exit strategy for their current business case, which will allow them to both *avoid* competition with DBS and cable operators, and receive a huge financial windfall.

Petitioners stress that two-way flexibility is the panacea to enhance competition with the cable monopolists. Petitioners' claim that the proposed rule changes will foster Internet access to schools, or is otherwise needed to promote the ITFS service and its educational goals, is similarly farfetched. No doubt, there has formed over time a symbiotic relationship between ITFS licensees and wireless operators.²⁰ The current environment, however, stands in stark contrast to circumstances surrounding earlier Commission actions to allow commercial sublicensing of public property, which were taken to supposedly bolster the ability of educators to attract and retain wireless cable operators as a source of funds without which "ITFS systems might never be

¹⁹ *Petition* at 15, 23. In the *1996 Cable Report*, the Commission noted that wireless cable operators were successful in using their existing architecture to provide a variety of high-speed Internet and other data services similar to those offered by other MVPDs. For example, in September 1996, wireless operator CAI began testing technology which would allow 27 megabits per second Internet access using General Instruments SURFSboard modems and a telephone return path. In addition, wireless operators PCTV and American Telecasting have been conducting Internet access trials in conjunction with Zenith Electronics Corporation, Conifer Corporation, and Comwave. Many of these efforts use similar, if not the same cable modems being developed for use by cable operators. *1996 Cable Report*, CS-96-133 at ¶ 64.

²⁰ As the Commission has recognized, about 95% of ITFS licensees lease excess capacity to wireless operators, and it is practicable to view a licensee's group of four ITFS channels as an "integral constituent" of a market-wide set of channels used to transmit instructional and entertainment programming. *MDS Auction Order*, 10 FCC Rcd 9589 at ¶ 8.

constructed and operated.”²¹ As the Commission has recognized, it is certainly no longer the case that ITFS channels are laying fallow, or that the flexibility petitioners now seek is needed to further the “cornerstone” of ITFS – providing educational programming to students enrolled at accredited schools for credit toward an academic degree or diploma.²² Quite to the contrary. As the Commission found in the *Channel Loading Report and Order*, demand for ITFS capacity has “surged” and there is not only

full use of the [ITFS] spectrum, but . . . full realization by educators of what was once only an unattainable aspiration: to become actively engaged in a technology that exposes their students to educational and interactive instructional programming previously inaccessible to them.²³

Nor is there any suggestion in the Petition -- beyond the mere recitation of the mantra, “Internet access to the schools” -- how providing two-way capabilities for ITFS and MDS licensees will in any way further that goal. Under the current rules, ITFS providers must program 40 hours per channel per week of instructional programming, and may lease the remaining ITFS capacity to wireless cable operators for the provision of commercial services.²⁴ Whether or not any particular ITFS licensee would, in fact, gain a new source of Internet access under the industry’s proposal is purely a function of whether it is inclined or is able to negotiate such access with the wireless operator that leases its excess ITFS capacity.

Moreover, under the industry’s proposal, ITFS and MDS channels are even more likely to operate as an integrated whole than they are today, with all available channels aggregated,

²¹ *Channel Loading Order*, 9 FCC Rcd 3360 at ¶ 22.

²² *Id.* at ¶ 2.

²³ *Id.* at ¶ 13.

²⁴ *Id.* at ¶ 18.

cellularized, and regrouped, presumably to provide an optimal package of multichannel and two-way services to area subscribers.²⁵ In that case, ITFS licensees will no doubt receive significantly increased lease payments, reflecting the increased value of public property in their hands. As is the case today, however, there is absolutely no reason to believe ITFS licensees will retain channel capacity beyond that needed to transmit their 40 hour minimum. Moreover, to the extent licensees are permitted to satisfy that minimum on digitally compressed channels, the capacity they would need to retain would be that much *smaller*.

D. The Proposed Changes Would Provide MDS and ITFS Interests with a Financial Windfall

The rule changes Petitioners propose have less to do with promoting competition or promoting education than with promoting the pecuniary interests of MDS and ITFS licensees. While the Petition offers Internet access as its *raison d'etre*, this is in reality a Trojan Horse to disguise a naked grab for free spectrum rights. With the flexibility Petitioners seek, ITFS and MDS licensees would have the ability to put together systems capable of providing virtually any fixed, two-way service, including switched voice and data service to endusers, private line services, and wholesale carriage to carriers. In fact, a BTA Authorization holder could assemble a 200 MHz system in the 2 GHz band that would have six times the capacity of a 30 MHz broadband PCS system (for which billions have been paid), would exceed the total capacity currently available to all CMRS licensees combined,²⁶ and it would also undercut the value to

²⁵ Indeed, Petitioners acknowledge that under their proposal it may be necessary for ITFS licenses to make their entire allocation available for return paths and program its minimum educational requirements on other channels controlled by the wireless operator. *Petition*, Ex. B at 42.

²⁶ CMRS licensees include: two cellular licenses with 25 MHz each; three broadband PCS licensees with 30 MHz each; three broadband PCS licenses with 10 MHz each, and the largest potential SMR provider holding multiple licenses totaling 10 MHz. *Report and Order*, Matter of Amendment of Parts 20 and 24 of the Commission's Rules

the National Treasury of the LMDS licenses in the 28 GHz band that the Commission will shortly auction.

Valuations of PCS licenses provide a useful starting point for assessing the windfall ITFS and MDS licensees would receive if the rules are changed as they propose. In the Washington, D.C. market, for example, the average winning bid for a 10 MHz PCS license in the recent D,E,F - Block PCS Auctions was about \$8 million. The net winning bid (after bidding credits) for a 30 MHz C-Block PCS license was \$260 million. Using these numbers as a rough guide, a four channel ITFS or MDS block of 24 MHz authorized for digital two-way service, that can be fully integrated into a market wide system using contiguous spectrum, would certainly be worth *tens of millions of dollars*. Similarly, if two-way capabilities were to be authorized as requested in the Petition, the paltry \$4.2 million paid by CAI for the Washington, D.C. BTA Authorization, would be viewed as one of the great bargains of our time.²⁷ Of course, because this same story would be repeated throughout the country, *the aggregate fiscal impact of this proposed giveaway is simply staggering*.

A far better approach, and one advocated by the Congressional Budget Office, is that licensees should be required to pay for the right to use their spectrum more flexibly.²⁸ As

- - Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, 11 FCC Rcd 7824 at ¶ 97 (1996)(*"Spectrum Cap Report and Order"*).

²⁷ According to a statement filed with the FCC by Atlantic Microsystems, Inc. ("AMI"), a wholly owned subsidiary of CAI, as of May 1996, AMI (upon conclusion of lease negotiations with 2 licenses), "will have rights to *all* of the available channel capacity in the Washington, D.C. BTA." *AMI Statement of Intention* at 2 (May 10, 1996) (emphasis supplied).

²⁸ *Congressional Budget Office, Reducing the Deficit: Spending and Revenue Options* 350, 351 (Aug. 1996). The Congressional Budget Office recommended auctioning "all of those licenses not originally assigned by auction at the time of their renewal," and "allowing license holders to pay for the right to use their spectrum assignments more flexibly." *Id.*

Chairman Hundt observed in his dissent to the Commission's decision in the *MDS Auction Order* to award the then-pending applications by lottery rather than auction, the "*FCC is not supposed to be the Federal Christmas Present Commission.*"²⁹ WebCel agrees that auctions are appropriate for spectrum flexibility and license renewal where licensees did not originally receive their licenses by auction. There are many ways to put spectrum flexibility to auction, including auctioning return paths only, opening a filing window for licenses for which flexibility is sought, and putting all MDS licenses up for auction under new, flexible service rules.

II. THE RETROACTIVE GRANT OF TWO-WAY AUTHORITY WOULD DEVALUE OTHER SERVICES, WOULD ADVERSELY AFFECT WIRELESS CAPITAL FORMATION, AND IS BAD SPECTRUM POLICY

An essential component of spectrum valuation is reasonable certainty as to the rules of the licensing process, both with respect to the spectrum that is being acquired and the spectrum held by competitors. To the extent the service rules governing particular spectrum provide for considerable flexibility, that spectrum will have a relatively higher value in the marketplace than comparable spectrum with significant use restrictions.³⁰ Thus, by giving away spectrum flexibility retroactively for some services while requiring licensees in other services to pay for it, the Commission will undermine the ability of bidders to efficiently value the spectrum, thereby introducing substantial uncertainty into the auction process.

This uncertainty is financially devastating for past and upcoming auction participants, both because it impairs the efficient and non-discriminatory access to capital markets and

²⁹ *MDS Auction Order*, 10 FCC Rcd 9589, 9740 (emphasis supplied).

³⁰ See Gregory L. Rosston and Jeffery S. Steinberg, *Using Market-Based Spectrum Policy to Promote the Public Interest* at 20 (Jan. 1997) ("*Rosston and Steinberg*") ("[E]ntrepreneurs likely will bid and invest greater amounts in spectrum if they know in advance that the use will be flexible and are confident that it will stay that way").

because it provides their competitors artificial economies that they cannot enjoy.³¹ The decision is also unfair to firms that chose not to apply for a service without two-way flexibility, but who would have participated in auctions for the more valuable rights that the industry now proposes to acquire for free.³²

Moreover, uncertainty is also detrimental to the auction process itself. In a macro sense, spectrum users and their financial supporters may decline to devote substantial additional capital toward new spectrum auctions where some competitors suddenly are handed huge retrospective auction benefits such as substantially increased flexibility, even for recently held auctions like MDS.³³ These concerns may already be affecting the auctions process. As *The Washington Post* reported last Saturday, one reason for the disappointing results in the recently closed WCS auctions is that “[p]otential bidders had difficulty raising bidding money in capital markets.”³⁴

Of course, given the value of flexibility, licensees, as in the instant Petition, “regularly appeal to the Commission to increase flexibility *after* the award of their licenses.”³⁵ However, for all the reasons discussed above, sound spectrum policy demands that such flexibility be

³¹ Thus, one key impact of such uncertainty is on the already difficult task of raising capital to participate in the licensing auctions, which will be further undermined to the extent spectrum users and their financial supporters are not reasonably certain of the rules that will govern spectrum use. As the Commission recognized in the *Spectrum Cap Report and Order*, “[o]ne of the most formidable barriers to [auction] participation is the difficulty [small] businesses face in raising sufficient capital to compete in the highly capital-intensive wireless communications business.” *Spectrum Cap Report and Order*, 11 FCC Rcd 7824 at ¶ 124.

³² *MDS Action Order*, 10 FCC Rcd 9589 at 9746 (Chairman Hundt, dissenting, in part, to decision to award pending applications by lottery as not “fair to those who chose not to apply for a small service area but who would have applied for the larger and more valuable area that will now be given away”).

³³ See *Rosston and Steinberg* at 20.

³⁴ *Latest License Auction Disappoints FCC; Total Comes Up Short of Expectations in Bargain Basement Bidding*, *Washington Post*, April 26, 1997, Section D, at 1.

³⁵ *Rosston and Steinberg* at 21.

granted *before* auctions take place, so parties know what they are bidding on, so that the auction process appropriately values the spectrum, and so that other licensees are not unfairly disadvantaged. As Rosston and Steinberg note:

Thus *before* a use of spectrum is authorized or a service initiated, the Commission should establish the rules affecting that use with as much certainty as is reasonable. For example, the Commission should set out in advance . . . the full range of flexibility allowed . . . and any other matters affecting the rights and obligations of licensees. Because of the value of flexibility, licensees regularly appeal to the Commission to increase flexibility after the award of their licenses, thereby generating opposition on equity grounds that might not have arisen if flexibility had been granted before the licenses were assigned. *In order to avoid such debates, and to maximize efficiency in the initial award of licenses, the Commission should award maximum flexibility initially.*³⁶

CONCLUSION

Granting the wireless cable industry unlimited two-way flexibility would confer a huge financial windfall on its participants at the expense of other communication providers, who paid for similar rights based on a good faith belief in the rules of the game, and the American public, who are denied the revenue such rights would bring at auction or otherwise. The proposal would also undermine the confidence of capital markets in Commission auctions, and in communication

³⁶ *Id.* (Emphasis supplied).

companies that bid on and have acquired radio spectrum at auction. For all these reasons the proposal would be bad spectrum policy, and the Petition should be denied.

Respectfully submitted,

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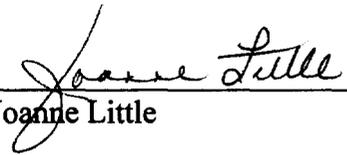
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Dated: April 30, 1997

CERTIFICATE OF SERVICE

This is to certify that on this 30th day of April, 1997, a copy of the foregoing Opposition of WebCel Communications to Petition for Rulemaking was served, by hand on the following persons:



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